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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-858

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING CO., INC., a corporation, and JOSEPH E. SIEGEL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS, THE SIEGEL TRADING CO., INC., a corporation, and JOSEPH E. SIEGEL

OPINIONS BELOW.

The decision of the United States District Court for the Northern District of Illinois, Civil Action No. 69 C 1030 (1970) (unpublished), the opinion of the United States Court of Appeals for the Seventh Circuit, 447 F. 2d 713 (7th Cir., 1971), and the order of the Court of Appeals, sitting *en banc,* denying the Petition for Rehearing on the Issue of Primary Jurisdiction (unpublished), appear in Petitioner's Appendix.

JURISDICTION.

These Respondents do not question the jurisdiction as set forth in Petitioner's brief.

STATUTES, REGULATIONS AND RULES INVOLVED.

The statutes involved in this case are:

Clayton Act, § 4, 15 U.S.C. § 15, which is reprinted in the Addendum attached to this brief;

Commodity Exchange Act, §§ 1-17b, 7 U.S.C. §§ 1-17b, particularly §§ 6, 6d, 6e, 7, 7a(1), 7a(2), 7a(8), 7a(9), 7b, 8, 8(a), 9, 12a, 13a, 13b, and 13c(b), the pertinent provisions of which are reprinted in the Addendum attached to this brief;

Sherman Act, § 1, 15 U.S.C. § 1, a pertinent part of which is reprinted in the Addendum attached to this brief.

The regulations involved in this case are:

Regulations of the Secretary of Agriculture, §§ 0.3, 0.8, 0.53, 0.58, 1.7, 1.8, and 1.41, 17 C.F.R. §§ 0.3, 0.8, 0.53, 0.58, 1.7, 1.8 and 1.41, pertinent parts of which are reprinted in the Addendum attached to this brief.

The Rules involved in this case are the following Rules of the Chicago Mercantile Exchange:

Rule 500, which is reprinted in the Argument of this brief; and Rules 307, 311, 313, 322 and 324, which are reprinted in Petitioner's Appendix, pp. 8-10.

QUESTIONS PRESENTED.

The questions presented are as follows:

1. Whether, having found that a complaint properly alleges group boycott, a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1, by a commodities exchange, its officers and a member, the Court of Appeals erred in ordering that the proceedings be stayed until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it.

2. Whether the Commodity Exchange Act and the doctrines of *Silver* v. *New York Stock Exchange* and *Thill Securities Corp.* v. *New York Stock Exchange* confer upon the Commodity Exchange Commission and/or the Secretary of Agriculture power to exercise primary jurisdiction and grant a partial exemption from the antitrust laws to commodity exchanges and the members thereof when exchange rules and actions provide for hearing upon the alleged wrongful transfer of an exchange membership.

STATEMENT.

This action was brought by Plaintiff-Petitioner, Thomas Ricci (hereinafter referred to as "Plaintiff") for treble damages under Section 4 of the Clayton Act, 15 U.S.C. §15. The Defendants are the Chicago Mercantile Exchange (hereinafter referred to as "CME"); three of its officers, Everette B. Harris, William Phelan, and Leo Melamed; and one of its members, Joseph E. Siegel, and The Siegel Trading Co., Inc., (hereinafter collectively referred to as "Siegel").

The case arises on the motion of the defendants to dismiss the complaint for failure to state a cause of action and for lack of jurisdiction.

Plaintiff's complaint, in the first ten paragraphs, alleged the jurisdiction and venue for bringing the action in the federal court, then described the parties to the action, then cited Rules 307, 311, 313, 322 and 324 of the CME and further alleged:

He purchased a membership on the CME on or about May 1, 1967, and thereafter engaged in business as a broker and trader of commodity futures on the CME. (A. 10). On or about February 11, 1969, the CME "wilfully, unlawfully, knowingly and maliciously confederated, combined, conspired and agreed with Siegel" to prevent plaintiff from continuing as a member of the CME. (A. 11). On or about February 11, 1969, plaintiff was informed by the CME that Siegel claimed ownership of his membership. (A. 11). Plaintiff notified the CME that Siegel was indebted to him in the amount of approximately $18,175.00 for floor brokerage fees and that plaintiff owed Siegel $15,000.00 for a loan to purchase the

membership. (A. 11). Defendant Phelan requested plaintiff to present his claim to the membership to the CME by virtue of Exhibit A which is attached to the complaint. (A. 11-12, 20). Siegel induced the CME to violate its rules to deprive plaintiff of his membership and to deny him trading privileges. (A. 12). The individual defendants and Siegel caused the CME to transfer plaintiff's membership to a third party and until plaintiff was able to purchase another membership on March 4, 1969, he was unable to trade and thus was damaged in his business and property. (A. 13).

The District Court allowed the motions of the defendants to dismiss the complaint on November 25, 1969.

The Court of Appeals on June 17, 1971, unanimously concluded that "absent any justification from the Exchange's status as a designated 'contract market' [under the Commodity Exchange Act, 7 U.S.C. §§1-17b], the complaint is sufficient to allege a group boycott, a *per se* violation of Section 1 of the Sherman Act." (A. 37). Then the Court of Appeals (Kerner, J., dissenting), relying on *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), and *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264 (7th Cir., 1970), *cert. denied*, 401 U.S. 994 (1971), reversed the judgment and remanded the action to the District Court with directions to stay the proceedings until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it. (A. 45).

On October 5, 1971, the Court of Appeals, sitting *en banc*, denied plaintiff's petition for rehearing. (A. 53).

This Court granted plaintiff's Petition for Writ of Certiorari to the Court of Appeals on February 28, 1972.

SUMMARY OF ARGUMENT.

The pleadings in this case present the proper situation for the exercise of primary jurisdiction by the Secretary of Agriculture and/or the Commodity Exchange Commission (hereinafter collectively referred to as the CEC) for study of the case in relation to the Commodity Exchange Act (CEA), rules and regulations of the CEC and Chicago Mercantile Exchange (CME), and the application of the antitrust laws to these statutes and rules. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), established the doctrine that a securities exchange is exempt under certain circumstances from the antitrust laws upon taking what otherwise would be anticompetitive action. The exemption is dependent upon a self-regulatory "scheme which performs the antitrust function of insuring that the exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Id.* at 358. The *Silver* doctrine was amplified by *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264 (7th Cir., 1970), *cert. denied*, 401 U.S. 994 (1971), which brought into play the role of the administrative agency in supervising the enforcement of exchange rules. *Thill* indicated that whether primary jurisdiction would lie depended in part upon the following factors: (1) The agency's power to weigh antitrust policy in fulfilling its duty of review of exchange self-regulation; (2) the ability of an aggrieved party to initiate agency review under the regulatory act; (3) the extent agency expertise would be useful in resolving the

question of whether the exchange rule was necessary to make the regulatory act work; and (4) the possibility of achieving the aims of the Sherman Act without subjecting exchanges to treble damage suits.

In a general way, the CEA and the CEC establish an analogous regulatory scheme to that of the securities industry. The exchange action in the instant case meets the requirements of *Silver* for exemption. Plaintiff failed to allege that the CME rules did not provide for notice and hearing. Actually, plaintiff could have availed himself of the CME's arbitration procedure under CME Rule 500. He did not allege that he attempted to pursue this remedy.

The case also falls within the guidelines of *Thill*. The CEC has the power to weigh antitrust policy pursuant to section 13c(b) of the CEA, which provides that the CEC may refrain from reporting minor violations of the CEA for prosecution whenever it appears that the public interest does not require it. Since the antitrust laws were passed to protect the public and not to foster private rights, the words "public interest" in section 13c(b) can be interpreted to mean "antitrust policy". Violations of the CEA which the CEC could refrain from reporting would include nonenforcement by the CME of its rules pursuant to sections 8(a) and 13a of the CEA by: (1) tampering with the membership of a member required to register under section 6 of the CEA, and thus failing to enforce bylaws relating to trading requirements pursuant to section 7a(8); and (2) failing to keep records of its meetings and those of its committees, clearly describing all matters discussed, pursuant to section 7a(2).

The second requirement of *Thill* is fulfilled by the Rules of the CEC. 17 C.F.R. §§ 0.3 and 0.53 allow any interested person having information of a violation to file an application requesting the institution of proceedings before the Secretary or the CEC. Sections 0.8 and 0.58 allow the Secretary and CEC to permit any person to intervene in a proceeding. The CEC possesses greater familiarity with the CEA and the rules of the CEC and CME than the courts. Furthermore, it is helpful to the courts if the agency interprets its own regulatory statute and then passes on its point of view to the courts. The fourth guideline of *Thill* dovetails with the first. The first embraces the agency's authority under the statute and general rules of the doctrine of primary jurisdiction. The fourth takes agency policy and the consequences thereof into account. Because exchanges tread a tightrope over an abyss of antitrust liability, *Silver* stated that it is desirable for the exchanges to receive protection from the antitrust laws under the umbrella of the regulatory agency if the exchange makes a reasonable effort at self-regulation. If there were no antitrust immunity, the exchanges, which are vital to the nation's economy, would be unable to operate.

ARGUMENT.

I.

THE COMMODITY EXCHANGE COMMISSION HAS PRIMARY JURISDICTION OF THE INSTANT CASE.

A. Pursuant to the Silver Case, the Commodity Exchange Act (CEA), and the Rules of the Secretary of Agriculture and the Commodity Exchange Commission (CEC) and the Chicago Mercantile Exchange (CME), the CEC Should Be Given an Opportunity to Weigh Antitrust Policy in This Matter Before It Is Heard in the Courts.

The doctrine of primary jurisdiction applies when a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views. *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956).

The doctrine arose out of judicial recognition of the need for orderly and sensible coordination of the work of agency and court and judicial realization that a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer. *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952). The doctrine serves as a device to prepare the way, if litigation should take its ultimate course, for a more informed and precise determination by the court of the scope and

meaning of the regulatory statute as applied to those particular circumstances. *Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U.S. 481, 498-499 (1958).

One of the most important practical effects of the application of the doctrine is that in some cases, an implied exemption of a regulated industry from the antitrust laws can arise. Under some regulatory schemes, the agency is not strictly bound by the dictates of the antitrust laws, but can and does approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance, provided that the agency takes into consideration the antitrust question. *Northern Natural Gas Co.* v. *Federal Power Comm'n*, 399 F. 2d 953 (D.C. Cir., 1968). These other considerations are given particular weight in the stock exchange, tobacco warehouse and trade association cases. These cases are viewed not as an exception to the general rule that an agreement in restraint of trade is a *per se* violation of the antitrust laws, but as distinguishable because the presumed purpose of the group action, generally with some degree of state control, is not to eliminate or exclude competition but, instead, to improve public service. *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 404 F. 2d 1008, 1012 n.3 (4th Cir., 1968).

The traditional primary jurisdiction cases have involved transportation cases which were referred to the Interstate Commerce Commission (ICC), the oldest regulatory agency and one with extensive and detailed authority over an industry governed by a legislative scheme whose policy is to control competition rather than to foster it. The question of whether primary jurisdiction

applies becomes more difficult when a court is confronted with a less-established regulatory scheme and regulatory agency, such as the Commodity Exchange Act (CEA) and the Secretary of Agriculture and/or the Commodity Exchange Commission, hereinafter collectively referred to as the CEC. In *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), this Court set forth the standards and methodology for determining when a securities exchange and its members, operating under a legislative and regulatory scheme, would be exempt from antitrust liability.

In *Silver*, plaintiff was a broker who was not a member of the Exchange. Without notice to plaintiff and without giving plaintiff an opportunity for a hearing, the Exchange ordered its members to cut off their wire connections with plaintiff, which greatly damaged plaintiff's business. Plaintiff brought an action for treble damages under the Sherman and Clayton Acts. The Exchange posed the defense that the Securities Exchange Act created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of the antitrust laws, thereby exempting the Exchange from antitrust liability.

This Court traced the history of the "federally mandated duty of self-policing by exchanges," *Id.* at 352, to H.R. Rep. No. 1383, 73d Cong., 2d Sess. 15 (1934), a report which led to the enactment of the Securities Exchange Act of 1934: "'The great exchanges of this country upon which millions of dollars of securities are sold are affected with a public interest in the same degree as any other great utility.'" *Id.* at 350.

"The pattern of governmental entry, however, was by no means one of total displacement of the ex-

changes' traditional process of self-regulation. The intention was rather, as Mr. Justice Douglas said, while Chairman of the S.E.C., one of 'letting the exchanges take the leadership with Government playing a residual role. . . .' Thus the Senate Committee Report stressed that 'the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so'." *Id.* at 352.

This Court went on to set forth the method by which the question of whether the regulatory scheme impliedly created an exemption from the antitrust laws could be answered: ". . . an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Id.* at 357, and added the caveat: "Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work." *Id.* at 357.

An analysis of the Securities Exchange Act reveals that the Securities Exchange Commission had the power to disapprove exchange rules, but did not have jurisdiction to review particular instances of enforcement of exchange rules. On the contrary, the CEA, sections 8(a) and 13a, provide:

> 8(a). The commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or that such board of

trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder. . . .

13a. If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or if any contract market, director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations or orders of the Secretary of Agriculture or the commission thereunder, the commission may, upon notice and hearing and subject to appeal as in other cases provided for . . . make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation. . . .

Section 7 referred to in sections 8(a) and 13a provides that a board of trade can be designated a contract market within the meaning of the CEA:

(f) When the governing board provides for making effective the final orders or decisions entered pursuant to the provisions of section 9 . . . and the orders issued pursuant to section 7a. . . .

Section 7a provides that each contract market shall—

(1) Promptly furnish the Secretary of Agriculture copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

(2) Keep all books, records, minutes, and journals of proceedings of such contract market, and its governing board, committees, subsidiaries and

affiliates in a manner that will clearly describe all matters discussed . . . and reveal any action taken in such matters and allow inspection . . . by [the Government].

(8) Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements. . . .

(9) Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Secretary of Agriculture.

Section 7a(8) refers to enforcement of rules relating to trading requirements. One requirement for trading on a designated contract market is that one must be a member thereof. Commodity Exchange Act, §6. Thus failure of an exchange to follow its membership rules is a violation of section 7a(8).

The CME also is alleged to have engaged in a conspiracy, i.e. a secret meeting, to deprive Plaintiff of his membership. This would be a violation of section 7a(2), and thus through section 7(f) brings the CME within the purview of sections 8(a) and 13a.

In each of these instances, punitive action is discretionary with the CEC.

It is interesting to note that sections 8(a), 13a, 7(f), 7a(2), and 7a(8), all were enacted in 1968, after the

rendition of *Silver*. Prior to 1968, the CEC had no jurisdiction over the enforcement, non-enforcement or misenforcement of the CME's rules. It is clear that the 1968 amendments close the *Silver* loophole and confer upon the CEC jurisdiction over the CME's enforcement of CME rules.

Despite its interpretation of the Securities Exchange Act, the *Silver* Court was sympathetic to the position of the Exchange, stating at 360-361:

> "[T]he absence of power in the Commission to review particular exchange exercises of self-regulation does create problems for the Exchange. The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act. Without the oversight of the Commission to elaborate from time to time on the propriety of various acts of self-regulation, the Exchange is left without guidance and without warning as to what regulative action would be viewed as excessive by an antitrust court possessing power to proceed. . . . But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act. . . . Although . . . the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws . . . particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim."

This court in *Silver*, over the dissent of Justices Harlan and Stewart, who agreed with the Exchange's position of almost total antitrust immunity, held that the Exchange's Act of self-regulation was unjustified because its rules did not provide for notice and hearing and it did not in fact gave Silver notice or an opportunity for a hearing.

Such is not the case here.

B. Plaintiff Failed to Avail Himself of the Regulatory Machinery of the CEA and the CME.

In an attempt to avoid the rule of *Silver* and to evade the thrust of sections 8(a) and 13a of the CEA, plaintiff alleged that his membership was transferred without notice or hearing. Yet no claim is made that the CEC was not enforcing sections 8(a) and 13a.

Indeed, the CME initiated hearing procedures by virtue of Exhibit A attached to the complaint. (A. 11-12, 20). Plaintiff failed to allege that he did pursue these hearing procedures. Furthermore, CME Rule No. 500 requires arbitration of disputes between Exchange members arising out of or related to Exchange transactions:

ARBITRATION

500. WHAT DISPUTES ARBITRATED.—It is declared to be contrary to the objects and policy of the Exchange that members should engage in litigation over disputes arising out of or related to Exchange transactions. When any such dispute occurs, either between members, or between a member and a non-member, it shall be reported within a reasonable time to the President by the party claiming to be aggrieved, and the President shall submit to the parties thereto, for their signatures, a form of agreement submit-

> ting such dispute to general arbitration. If a member refuses to arbitrate and if the matter involves or directly relates to a transaction or transactions upon the Exchange, the President shall determine whether or not the matter shall be arbitrated and he shall notify the parties in writing. A member receiving notice from the President that he is required to arbitrate shall have ten days in which to file an appeal with the Board. The appeal shall be in writing and shall state the member's reasons for refusing to arbitrate. The Board shall, after hearing, reverse or affirm the ruling of the President. Any member who, without appealing, refuses to abide by the ruling of the President or refuses to abide by the ruling of the Board after appeal shall be guilty of a major offense. After the parties have signed the agreement for arbitration the President shall refer the dispute to the Committee on Arbitration.

Plaintiff neither alleged the lack of existence of this rule nor that he was denied a hearing under this rule. It would appear that the existence of this rule and plaintiff's failure to pursue the hearing procedures would place the CME and Siegel outside the ambit of the antitrust laws and that the dispute would be subject to CEC jurisdiction under the doctrine of *Silver* and the provisions of the CEA.

Thus, despite plaintiff's contention (Brief for Plaintiff, p. 19), this case does not involve the question of whether the CME violated its own rules. The question is whether, under the provisions of the CEA, the CME established a set of rules sufficient to provide plaintiff with a hearing and whether he availed himself of said

rules. See *States Marine Lines, Inc.* v. *Federal Maritime Comm'n*, 376 F. 2d 230 (D.C. Cir., 1967).

Not only does the CEC have the power to oversee the enforcement of exchange rules under sections 8(a) and 13a, but it was given the following power by section 13c(b) of the CEA:

> 13c(b). Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action.

Since the antitrust laws were enacted with the primary objective of protecting the public interest and not for the enforcement of private rights, *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 491-493 (1940), it is clear that the CEC's discretion to take public interest into account constitutes a mandate to take antitrust principles into account and to submerge them in the proper circumstances. To deny the CEC its discretion to keep within its bosom the violation alleged here would serve to destroy the statutory scheme of the CEA, spearheaded by sections 8(a), 13a, and 13c(b), which all were established by Congress in 1968, after the *Silver* case and most of the leading cases dealing with primary jurisdiction had been decided.

II.

ANSWER TO PLAINTIFF'S ARGUMENTS.

A. "Fundamental" Antitrust Policy Is Ameliorated by the Flexibility and Dynamism of the Antitrust Laws.

Concededly, the rule is firmly established that repeal of the antitrust laws by implication from a regulatory

statute will be strongly disfavored. However, the antitrust laws were not meant to be a panacea for all wrongs. *Parmelee Transp. Co.* v. *Keeshin*, 292 F. 2d 794, 804 (7th Cir., 1961), *cert. denied*, 368 U.S. 944 (1961), and do not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945). It is a living, dynamic law to be adjusted to times and to new situations. *Noerr Motor Freight, Inc.* v. *Eastern R.R. Presidents Conference*, 155 F. Supp. 768, 812 (E.D. Pa., 1957), *rev'd*, 365 U.S. 127 (1961). It has been sufficiently demonstrated that *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), held that such an exemption exists for securities exchanges pursuant to the Securities Exchange Act under the proper circumstances. The reasoning applied in *Silver* can be applied here to the CME, CEC and CEA.

B. Immunity From the Antitrust Laws Does Not Have To Be Expressly Stated in the Regulatory Statute To Be Effective.

Plaintiff seeks to deprive the defendants of antitrust immunity by illustrating that the CEA does not expressly grant immunity. However, this approach is fallacious. An analysis of the primary jurisdiction cases from their beginning in *Texas Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), establishes that the "principal criterion in deciding whether the doctrine is applicable usually is not legislative intent but usually is judicial appraisal of need or lack of need for resort to administrative judgment." DAVIS, ADMINISTRATIVE LAW TEXT, § 19.06 (3d ed., 1972). Primary jurisdiction is an evolving, expanding concept which is not a slave to the antitrust laws.

C. The CEC Is Given the Power to Consider the Public Interest and Thus Can Determine Whether the Antitrust Laws Apply in This Case.

The application by the Court below of the four requirements for primary jurisdiction set forth in *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264 (7th Cir., 1970), *cert. denied*, 401 U.S. 994 (1971), rebuts plaintiff's contention that the antitrust laws override the CEC's concept of the public interest. (Brief of Plaintiff, p. 22). Firstly, the CEC has power to weigh antitrust policy under its enforcement powers. Under the statutory scheme, all exchanges and members thereof must register with and report to it. Thus the CEC has a deep interest in actions of the Exchanges and members thereof which may affect the membership of one of the members. Secondly, the aggrieved party may initiate CEC review, 17 C.F.R. §§ 0.3, 0.8, or may apply to intervene, §§ 0.53 and 0.58. Thirdly, the CEC's expertise is necessary. It controls the exchanges and their members and presumably has greater knowledge of the CEA and its own rules and policy than the courts. Fourthly, the Court of Appeals has clearly demonstrated that the CEC's discretion not to report minor violations of the Act would be inconsistent with an antitrust award of treble damages. The CEC can better vindicate the public interest by utilizing the discretion granted to it by section 13c(b) than can the courts by strictly applying a statute which carries with it a treble damage penalty. Punitive damages are not favored in the law, *Brown* v. *Coates*, 253 F. 2d 36, 39 (D.C. Cir., 1958), and thus the express policy of the CEA should not be ignored.

Plaintiff's discussion of the history of the Capper-Volstead Cooperative Marketing Associations Act and the Robinson-Patman Price Discrimination Act sheds no light

on the situation at hand. The Capper-Volstead Act deals with agricultural producers, who by their nature form associations, which, without an exemption, might encroach upon the antitrust laws. See *Maryland & Va. Milk Producers Ass'n.* v. *United States*, 362 U.S. 458 (1960). The Robinson-Patman Act deals directly with antitrust problems.

D. Courts Will Defer Antitrust Questions to Administrative Agencies Without the Necessity of Specific Statutory Provisions.

Plaintiff contends (Brief of Plaintiff, p. 17) that the lower federal courts have refused to defer to administrative agencies for antitrust determinations in the absence of specific congressional authority. However, this conclusion ignores *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264 (7th Cir., 1970), *cert. denied*, 401 U.S. 994 (1971), and *Kaplan* v. *Lehman Brothers*, 371 F. 2d 409 (7th Cir., 1967), *cert. denied*, 389 U.S. 954 (1967). All of these cases recognized the exemption of the securities exchanges from the antitrust laws notwithstanding the silence of the Securities Exchange Act on the subject.

Plaintiff's citation of *Denver Union Stockyard Co.* v. *Denver Livestock Commission Co.*, 404 F. 2d 1055 (10th Cir., 1968), *cert. denied*, 394 U.S. 1014 (1969), is inapposite because the court held that the Packers and Stockyards Act, 7 U.S.C. §225, specifically states that nothing therein shall create an exemption from the Sherman or Clayton Acts. The fact that stockyards and commodity exchanges are both under the authority of the Secretary

of Agriculture does not make the Packers and Stockyards Act of 1921 and the CEA analogous. Furthermore, the court, in *Denver Union Stockyard*, stated that there is no fixed formula for the application of the doctrine of primary jurisdiction. *Id.* at 1056.

Crain v. *Blue Grass Stockyards Co.*, 399 F. 2d 868 (6th Cir., 1968), cited by plaintiff, also turned on a construction of the Packers and Stockyards Act.

In *Seatrain Lines, Inc.* v. *Federal Maritime Comm'n*, 1972 Trade Reg. Rep. ¶73,898 (D.C. Cir., 1972), the court merely held that a simple sale of assets by one carrier to another is not subject to the jurisdiction of the Federal Maritime Commission (FMC). The case turned on the provisions and legislative history of the Shipping Act, which cannot be said to be analogous to the CEA. Furthermore, the court noted that no record was developed by the FMC detailing its weighing of the antitrust and industry considerations, and that in fifty years, the FMC had not attempted to exercise jurisdiction over this type of matter, which indicated to the court that even the FMC held the view that the FMC did not have jurisdiction.

Though implied in plaintiff's brief (pp. 17-19), *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 1971 Trade Cas. ¶73,775 (S.D. N.Y., 1971), does not set forth the proposition that a court will not recognize primary jurisdiction for antitrust determinations in the absence of specific congressional authority. On the contrary, the court stated at p. 91,273: *"While an express finding of immunity from the anti-trust laws may not be necessary to confer immunity,* the record does not support blanket approval. . . ." (Emphasis added.) The case turned on the

scope of Civil Aeronautics Board (CAB) regulation and the facts of the case.

E. The CEA Is Sufficiently Pervasive to Confer Primary Jurisdiction Upon the CEC.

As our society and the apparatus of government become more complex, so the doctrine of primary jurisdiction evolves beyond its original restrictiveness. This evolution was recognized by this Court in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). In analyzing the Securities Exchange Act, a statute somewhat analogous to the CEA, this Court stated:

> "Although, as we have seen, the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws, . . . it is also true that particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim." *Id.* at 360-361.

On a parallel plain, it has been stated that the Sherman Act is couched in broad terms, and is adaptable to the changing types of commercial production and distribution which have evolved since its passage. *United States* v. *E. I. DuPont DeNemours & Co.,* 351 U.S. 377, 386 (1956).

Since most of the primary jurisdiction cases have involved problems of regulatory agencies *vis-a-vis* routes and rates, necessarily the law on the subject has been considered and discussed in that limited context. See *United States* v. *Radio Corp. of Am.,* 358 U.S. 334, 348 (1959). However, when the doctrine is applied to a regulatory agency which is not of the nature of the ICC

or the CAB, the language describing the relationship of the doctrine to those latter bodies should not restrict the application of the doctrine to another type of regulatory agency, such as the CEC.

The Secretary of Agriculture and the CEC have as complete and pervasive authority to regulate the operation of their industry as the other agencies. The Secretary of Agriculture has the power to authorize and designate a board of trade as a contract market (7 U.S.C. §7); to receive all bylaws, rules, regulations and resolutions of a contract market (7 U.S.C. §7a(1)); to suspend a contract market for not enforcing its own rules (7 U.S.C. §8(a)); to register traders on a contract market and to order certain traders to desist from trading on a contract market (7 U.S.C. §§9, 12a). Thus the Secretary of Agriculture has the power to control who shall engage in the commodity trading business and has jurisdiction over any violation by a contract market of its own membership rules by virtue of sections 6, 7a(8), 8(a), and 13a.

The difference in the regulatory schemes between the CEA and a more established regulatory act such as the Interstate Commerce Act is one of kind, not one of degree as plaintiff contends. The CEA regulates the various aspects of the framework of the industry, e.g. the exchanges, the member firms, the individual traders. It requires registration and reports for each type of party engaged in the industry. Competition is regulated. The CEC's authority to control its industry and to determine who will compete in its industry as an exchange and as a trader is just as complete as the ICC's. Obviously, the prices of the commodities are not regulated, but this is because the raison d'etre of the commodities industry

is to determine prices by competitive bidding in an orderly way. This necessary "orderly way" is established and sustained by the pervasive regulation of the CEA. See, Comment, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV., 1486, 1492 (1966).

California v. *Federal Power Comm'n*, 369 U.S. 482 (1962), cited by plaintiff, does not even deal with the "pervasive regulatory scheme" question. This Court found that a specific provision of the Clayton Act expressly provided that the Federal Power Commission (FPC) cannot enforce the antitrust laws and that thus the FPC, in a prior administrative ruling, had usurped its powers.[1]

Maryland & Va. Milk Producers Ass'n. v. *United States*, 362 U.S. 458 (1960), also did not touch the "pervasiveness" issue. In this case, an agriculture cooperative was given a statutory antitrust exemption to make agreements to process, handle and market agricultural produce for its producer members, subject to the approval of the Secretary of Agriculture. This Court held that this statute did not thereby grant an antitrust exemption to and confer upon the Secretary of Agriculture jurisdiction over a monopolistic agreement between such a cooperative and another entity involved in another step in the chain of distribution of the produce.

United States v. *Radio Corp. of Am.*, 358 U.S. 334 (1959), also was cited by plaintiff to support his con-

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[1] DAVIS, ADMINISTRATIVE LAW TEXT §19.05 n.8 (3d ed., 1972), states that *California* v. *Federal Power Comm'n* is out of line with the cases in the development of the doctrine of primary jurisdiction and will probably also be out of line with future cases.

tention that a pervasive regulatory scheme is necessary for the invocation of primary jurisdiction. This case involved a Government suit for divestiture after an exchange of television stations which the Federal Communications Commission (FCC) had approved. This Court studied the legislative history of the Communications Act and found that the legislative history specifically stated that the FCC had no authority to pass on antitrust violations as such. *McKeon Construction* v. *McClatchy Newspapers*, 1970 Trade Cas. ¶73,212 (N.D. Cal., 1969), merely followed *R.C.A.*

In *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 352 (1963), this Court found that the legislative history of the Bank Merger Act specifically stated that the "Act would not affect in any way the applicability of the antitrust laws to bank acquisitions." This Court also observed that banking regulation is less complete than public utility regulation. However, banking regulation is not analogous to regulation of the commodities industry. Each bank is a separate unit, doing business independently. On the contrary, the vitality of the commodities industry is closely tied to the exchanges, the limitations of their memberships, and the relationships of the members thereof to each other.

F. The Question of Whether Defendant's Actions Were Arguably Lawful Is Not Reached in This Case.

Plaintiff contends that the defendant's conduct must be "arguably lawful" under the regulatory statute for primary jurisdiction to attach. However, plaintiff fails to set forth the doctrine correctly and then cites cases which do not even support his position.

The arguably lawful doctrine merely provides that if a regulatory agency approved the action of a party, that party can interpose said agency approval as a defense in a subsequent judicial antitrust action. The doctrine only applies when there has been a prior hearing before an agency and subsequently the defendant is subjected to an antitrust suit. However, merely because there never was a prior administrative determination does not mean the defendant has no defense to the antitrust suit and that primary jurisdiction cannot attach. Since there has been no prior administrative hearing in the instant action, defendants never have been able to obtain a determination that their actions were lawful.

Plaintiff's statement that the court below did not find that the defendants' conduct was arguably lawful begs the question. The court held that the complaint states a cause of action under the antitrust laws *prescinding from* the CEA and the doctrine of primary jurisdiction but that whether the complaint, taking those two factors into account, states a cause of action, is a question that the court below held should be answered by the Secretary of Agriculture and/or the CEC.

In *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966), this Court merely stated that agreements previously approved by the FMC are, *by statute,* exempt from the antitrust laws, but agreements not approved are not exempt. In the instant case, because plaintiff failed to follow CME Rule 500, defendants never had an opportunity to determine if their actions were legal.

The citation of *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.,* 393 F. 2d 441 (2d Cir., 1968),

cert. denied, 393 U.S. 846 (1968), also is inapposite. Defendants entered into a monopolistic agreement which had not been filed with or approved by the CAB. The court held that defendants therefore could not argue that the agreement was arguably lawful and the court refused to grant primary jurisdiction to the CAB.

Marnell v. *United Parcel Service of Am., Inc.,* 260 F. Supp. 391 (N.D. Cal., 1966), is directly in support of defendants' position. The very reason the Court of Appeals below remanded this case to the Secretary of Agriculture is because "the conduct in question might be exempt from the antitrust laws by the regulatory agency under some express or plainly implied provision of the regulatory act." *Id.* at 412. In *Marnell,* the court held that defendants did not receive permission from the state commerce commission to commit the monopolistic acts they committed, and that the state commerce commission and the ICC had no jurisdiction over those types of acts.

In *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.,* 1971 Trade Cas. ¶73,775 (S.D. N.Y., 1971), the court held that the CAB did not have jurisdiction to decide the question involved.

G. The CEC Has the Power to Hear the Case.

1. Plaintiff can file a complaint with the CEC.

2. The CEC's inability to award damages does not deprive it of primary jurisdiction.

Plaintiff's contention that he is without right to appear before the administrative agency is without merit when considered in the light of 17 C.F.R. §§0.3 and 0.53, which provide that "any interested person having any information of any violation of the act . . . may file . . . an ap-

plication requesting the institution" of proceedings before the Secretary or the Commission. To term the Commission as impotent because it has the discretion to exclude him is a contradiction in terms. If the Commission excludes him improperly, plaintiff can always appeal. Plaintiff's argument is similar to an argument that a court has no jurisdiction over a party's case since it might hold against the party.

It is clearly established that an agency's lack of power to award damages does not prevent the application of the doctrine of primary jurisdiction. If that were the case, the doctrine never would have taken root and developed. *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296, 311-312 (1963), recognized that the

> "[Civil Aeronautics] Board has no power to award damages or to bring criminal prosecutions. Nor does it, as already noted, have jurisdiction over every antitrust violation by air carriers. But where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, *Congress must have intended to give it authority that was ample to deal with the evil at hand.*" (Emphasis added.)

In *General Am. Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422, 433 (1940), a suit for breach of contract was referred to the ICC, which had no jurisdiction to grant damages. This Court said:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the act."

See also *Thompson* v. *Texas M. Ry.,* 328 U.S. 134 (1946).

It is implicit in the cases cited by plaintiff that the courts first grappled with the dispositive question of whether there was partial antitrust immunity and decided this question in the negative. Then the courts went on to say that since the agency had no power to grant the damages to which the courts found the plaintiff was entitled, primary jurisdiction did not lie. On the other hand, if there be partial antitrust immunity, as there is in this case, the plaintiff is not entitled to treble damages and the question of the agency's power to award them is not reached.

For example, in *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F. 2d 441 (2d Cir., 1968), *cert. denied*, 393 U.S. 846 (1968), cited by plaintiff, the court held that plaintiff did not have to exhaust his administrative remedies before an administrative agency which had no power to grant the relief sought, since the alleged anticompetitive agreement did not have CAB approval and thus was not exempt from the antitrust laws. On the contrary, in the instant matter, the CEC has jurisdiction over the parties, plaintiff has an opportunity to have a CEC hearing, and the activity is potentially exempt from the antitrust laws under sections 8(a), 13a, and 13c(b) of the CEA and the doctrine of the *Silver* case.

Trans World Airlines, Inc. v. *Hughes*, 214 F. Supp. 106 (S.D. N.Y., 1963), *aff'd*, 332 F. 2d 602 (2d Cir., 1964), *petition for cert. dismissed*, 380 U.S. 249 (1965), dealt with a statute that declares it unlawful without CAB approval for anyone engaged in a phase of aeronautics to acquire control of an air carrier, and that with such CAB approval the acquisition is exempt from the antitrust

laws. Defendant was a manufacturer of aircraft. Pursuant to CAB approval, it acquired control of TWA. Subsequently defendant committed antitrust violations by economically coercing TWA to purchase only defendant's aircraft. The court held that these acts were not the types of acts over which the CAB had primary jurisdiction; that the CAB only had jurisdiction over the acquisition itself, "rather than the broad range of activities into which the controller may enter thereafter." 332 F. 2d at 608. After the acquisition, the CAB retains jurisdiction over the air carrier, but not over the company that owns controlling stock in the air carrier. The court's statement that the Board is unable to grant damages is a non sequitur and *dicta*. Under the proper set of facts, as in the instant case, this inability should not preclude primary jurisdiction.

In *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 1971 Trade Cas. ¶73,775 (S.D. N.Y., 1971), defendant was a freight forwarding company owned by seventeen certified air carriers. Defendant had hired plaintiffs to handle its freight and then discharged plaintiffs and hired its own subsidiary. Defendant had been established with CAB approval, but its subsidiary had not. The court held at 91,273:

> "While an express finding of immunity from the antitrust laws may not be necessary to confer immunity, the record does not support blanket approval or continued surveillance of the activities of Air Cargo, Inc. itself acting on its own—to be distinguished from broader, over-all scrutiny of such conceded areas of traditional C. A. B. expertise as tariffs."

The court followed the reasoning of *TWA. Denver Petroleum Corp.* v. *Shell Oil Co.*, 306 F. Supp. 289 (D. Colo., 1969), did not involve the agency power to award

damages, but merely found that under the Mineral Lands Leasing Act the agency had no power to exempt crude oil pipelines from the obligations under the Act.

III.

ANSWER TO THE GOVERNMENT'S ARGUMENTS.

A. The Regulatory Scheme of the CEA Is Sufficiently Pervasive.

B. Antitrust Immunity Arises from the CEA and the Silver Case.

C. The CEC Has the Power to Grant Effective Relief.

D. The CEC Has the Expertise Sufficient for the Application of Primary Jurisdiction.

E. The CEC Has a Procedure Sufficient to Hear This Case.

The Government attempts to establish that the CEA's regulatory scheme is not pervasive by comparing the Act to the shipping, transportation and aeronautics cases. (Brief of Government, p. 22). Merely because the regulatory schemes in the latter cases are more detailed does not mean that they are more pervasive. The commodities industry is regulated to the extent necessary to regulate the industry and to protect the public. Contrary to the contention of the Government (Brief of Government, p. 24), entry into the industry is controlled by statute and rules. Commission merchants, brokers, and floor traders, 7 U.S.C. §§6e and 12a, 17 C.F.R. §§1.7 and 1.8; and exchanges, 7 U.S.C. §7 and 17 C.F.R. §1.41, must register with the Secretary and are subject to revocation of registration for violation of the rules. 7 U.S.C. §§ 7b, 8, and 9.

The immunity from the antitrust laws arises both from the statute, 7 U.S.C. §§8(a), 13a, and 13c(b) and from the case law. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). (See discussion, pp. 11-16, *supra*.)

The power of the Secretary and/or CEC to grant effective relief against conduct which violates antitrust policies is discussed at pp. 28-32, *supra*.

The Government's citation of the proposed bill to confer jurisdiction of the Secretary over a person who has restrained trade in connection with the sale of any commodity (Brief of Government, p. 24, n.12) is inapposite. In the instant case, the alleged restraint was not on the sale of a commodity future. As in the *Silver* case, where the restraint was not on the trading of a particular security, the restraint was on plaintiff's business. The regulatory scheme of the CEA, coupled with the reasoning of *Silver*, clearly places the restraint on plaintiff's business within the jurisdiction of the CEC.

The issue of the relationship of 7 U.S.C. §13c(b) to the antitrust laws is discussed at p. 18, *supra*.

Clearly the CEC has greater familiarity and experience with the provisions of the CEA, the rules of CEC, the rules of the CME, and the procedures in the industry than the courts and would be helpful to the court's ultimate decision. In *Silver*, this court stated at 362-363:

> "Provision of such a hearing will, moreover, contribute to the effective functioning of the antitrust court, which would be severely impeded in providing the review of exchange action which we deem essential if the exchange could obscure rather than illuminate the circumstances under which it has acted. Hence the affording of procedural safeguards not only will substantively encourage the lessening of

> anticompetitive behavior outlawed by the Sherman Act but will allow the antitrust court to perform its function effectively."

Whether or not the agency happens to be an expert, a court normally should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer, for otherwise parties who are subject to the agency's continuous regulation may become victims of uncoordinated and conflicting requirements. *Far East Conference* v. *United States,* 342 U.S. 570, 574-575 (1952); DAVIS, ADMINISTRATIVE LAW TEXT, §19.01 at 374 (3d ed. 1972).

Particularly with regard to a statute such as the CEA, which is not often the subject of litigation, and sections 8(a), 13a, and 13c(b), which were added in 1968 and about which there is a paucity of legislative history, it would be helpful to the court if the CEC could express its opinions on their scope and meaning. *Federal Maritime Bd.* v. *Isbrandtsen Co.,* 356 U.S. 481, 498-499 (1958).

By citing *Far East Conference* v. *United States,* 342 U.S. 570, 574, and *United States* v. *Western Pac. R.R.,* 352 U.S. 59, 64-65 (1956), the Government tries to limit the application of the doctrine of primary jurisdiction to transportation cases. *Local Union No. 189* v. *Jewel Tea Co.,* 381 U.S. 676 (1965); *Vaca* v. *Sipes,* 386 U.S. 171, 176-188 (1967); *Carey* v. *Westinghouse Electric Corp.,* 375 U.S. 261 (1964); and *Smith* v. *Evening News Ass'n.,* 371 U.S. 195 (1962), were controlled by a statute which expressly precluded primary jurisdiction. *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), hinged on an interpretation of the Securities Exchange Act in a stockholder's derivative suit and is not in point.

Contrary to the Government's position, the denial of primary jurisdiction could interfere with the regulatory scheme since the CEC has jurisdiction over the enforcement of the CME's rules by virtue of 7 U.S.C. §§8(a) and 13a. These sections expressly grant the CEC power which this Court correctly observed in *Silver* that the SEC lacked: "[J]urisdiction to review particular instances of enforcement of exchange rules." 373 U.S. at 357.

The Government contends that the CEC is obliged only to oversee enforcement of exchange rules relating to "trading requirements" and that plaintiff's cause of action does not relate to trading requirements.

However, as the Court of Appeals below stated, "Membership in a contract market is a prerequisite to lawful trading in commodities futures. Title 7, U.S.C.A. §6. Therefore, Rule 307, allegedly violated in the transfer of appellant's membership, and Rule 322, allegedly violated in the attempt to cancel appellant's authorization to trade, both relate to 'trading requirements.'" (A. 41).

CONCLUSION.

For the foregoing reasons, Respondents, The Siegel Trading Co., Inc., and Joseph E. Siegel, respectfully pray that the judgment of the Court of Appeals remanding this action to the District Court with directions to stay the proceedings until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it be affirmed.

Respectfully submitted,

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ADDENDUM

CLAYTON ACT, §4, 15 U.S.C. §15

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

COMMODITY EXCHANGE ACT, 7 U.S.C. §§1-17b,

provides *inter alia* as follows:

§6. Prohibition against dealings in commodity futures; exceptions

It shall be unlawful for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of commodity for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in commodity or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering commodity sold, shipped, or re-

ceived in interstate commerce for the fulfillment thereof, except, in any of the foregoing cases, where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market," as hereinafter provided in this chapter, and if such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery; *Provided,* That each board member shall keep such record for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice. (Sept. 21, 1922, ch. 369, § 4, 42 Stat. 999; June 15, 1936, ch. 545, §§ 2, 4, 49 Stat. 1491, 1492.)

§6d. Futures commission merchants, dealing by unregistered merchants prohibited; moneys and securities of customers, care and use

It shall be unlawful for any person to engage as futures commission merchant in soliciting orders or accepting orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market unless—

(1) such person shall have registered, under this chapter, with the Secretary of Agriculture as such futures commission merchant and such registration shall not have expired nor been suspended nor revoked; and

(2) such person shall, whether a member or non-member of a contract market, treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer. * * * * (Sept. 21, 1922, ch. 369, § 4d, as added June 15, 1936, ch. 545, § 5, 49 Stat. 1494, and amended Feb. 19, 1968, Pub. L. 90-258, § 6, 82 Stat. 27.)

§6e. Floor brokers; dealings by unregistered broker prohibited

It shall be unlawful for any person to act as floor broker in executing any orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market unless such person shall have registered, under this chapter, with the Secretary of Agriculture as such floor broker and such registration shall not have expired nor been suspended nor revoked. (Sept. 21, 1922, ch. 369, § 4e, as added June 15, 1936, ch. 545, § 5, 49 Stat. 1945.)

§7. Designation of board of trade as "contract market"; conditions and requirements

The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

(a) When located at a terminal market where any cash commodity of the kind specified in the contracts of sale of commodity for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the commodity and the differences in value between the various grades of such commodity, and where there is available to such board of trade, official inspection service approved by the Secretary of Agriculture for the purpose: *Provided,* That any board of trade not so located shall be designated as a "contract market" if such board of trade provides for the delivery of commodities on such contracts at a delivery point or points and upon terms and conditions approved by the Secretary of Agriculture.

(b) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Secretary of Agriculture may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery consummated on or subject to the rules of a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated on or subject to the rules of a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said trans-

actions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to the inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of commodity in interstate commerce.

(d) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

(e) When the governing board thereof does not exclude from membership in and all privileges on such board of trade any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in any cash commodity business, if such association has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided,* That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

(f) When the governing board provides for making effective the final orders or decisions entered pursuant to

the provisions of section 9 of this title, and the orders issued pursuant to the provisions of section 7a of this title, and for compliance in all other respects with the requirements applicable to such board of trade under this chapter. (Sept. 21, 1922, ch. 369, § 5, 42 Stat. 1000; June 15, 1936, ch. 545, §§ 2, 6, 49 Stat. 1491, 1497; Feb. 19, 1968, Pub. L. 90-258, §§ 10, 11, 82 Stat. 29.)

§7a. **Duties of contract markets**

Each contract market shall—

By-laws, rules, etc.; furnishing copies to Secretary

(1) Promptly furnish the Secretary of Agriculture copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

Access for inspection of books and records

(2) Allow inspection at all times by any authorized representative of the United States Department of Agriculture or United States Department of Justice of the books, records, and all minutes and journals of proceedings of such contract market, its governing board and all committees, and of all subsidiaries and affiliates of such contract market, which books, records, minutes, and journals of proceedings shall be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct;

* * * *

Enforcement of bylaws, etc., relating to trading requirements

(8) Enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board there-

of or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have not been disapproved by the Secretary of Agriculture pursuant to paragraph (7) of section 12a of this title; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been so disapproved; and

Enforcement of bylaws, etc., providing minimum financial standards and related reporting requirements

(9) Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Secretary of Agriculture. (Sept. 21, 1922, ch. 369, § 5a, as added June 15, 1936, ch. 545, § 7, 49 Stat. 1497, and amended Feb. 19, 1968, Pub. L. 90-258, § 12, 82 Stat. 29.)

§7b. Suspension or revocation of designation as "contract market"

The failure or refusal of any board of trade to comply with any of the provisions of this chapter, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a "contract market" in accordance with the procedure and subject to the judicial review provided in section 8 of this title. (Sept. 21, 1922, ch. 369, § 5b, as added June 15, 1936, ch. 545, § 7, 49 Stat. 1498, and amended Feb. 19, 1968, Pub. L. 90-258, § 13, 82 Stat. 30.)

§8. Application for designation as "contract market"; suspension or revocation of designation; hearing; review by court of appeals

Any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the conditions of section 7 of this title, and with a sufficient assurance that it will continue to comply with the requirements of such section 7. In the event of a refusal to designate as a "contract market" any board of trade that has made application therefor, such board of trade shall be afforded an opportunity for a hearing before the commission, with the right to appeal an adverse decision after such hearing to the court of appeals as provided for in other cases in paragraph (a) of this section.

(a) The commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided,* That such suspension or revocation shall be final and conclusive, unless within fifteen days after such suspension or revocation by the commission such board of trade appeals to the court

of appeals for the circuit in which it has its principal place of business, by filing with the clerk of such court a written petition praying that the order of the commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, who shall thereupon notify the other members of the commission and file in the court the record in such proceedings, as provided in section 2112 of Title 28. The testimony and evidence taken or submitted before the commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the commission or may direct it to modify its order. No such order of the commission shall be modified or set aside by the court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of the commission. (Sept. 21, 1922, ch. 369, § 6(a), 42 Stat. 1001; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub. L. 85-791, § 7(a), 72 Stat. 944; Feb. 19, 1968, Pub. L. 90-258, §§ 14, 15, 82 Stat. 30.)

§9. Exclusion of persons from privilege of "contract markets"; procedure for exclusion; review by court of appeals

If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or has willfully made any false or misleading statement of a material fact in any registration application or any report filed with the Secretary of Agriculture under this chapter, or willfully omitted to state in any such application or report any material fact which is required to be stated therein, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, he may serve upon such person a complaint stating his charges in that respect, which complaint shall have attached or shall contain therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made prohibiting him from trading on or subject to the rules of any contract market, and directing that all contract markets refuse all trading privileges to such person, until further notice of the Secretary of Agriculture, and to show cause why the registration of such person, if registered as futures commission merchant or as floor broker hereunder, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Secretary of Agriculture, or before a referee designated by the Secretary of Agriculture, which referee shall cause all evidence to be reduced to writing and forthwith transmit the same to

the Secretary of Agriculture. Upon evidence received, the Secretary of Agriculture may prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person. Notice of such order shall be sent forthwith by registered mail or by certified mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the Secretary of Agriculture, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secretary of Agriculture be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary of Agriculture and thereupon the Secretary of Agriculture shall file in the court the record theretofore made, as provided in section 2112 of Title 28. Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Secretary of Agriculture, and the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive. (Sept. 21, 1922, ch. 369, § 6(b), 42 Stat. 1001; June 15, 1936, ch. 545, § 8(a)—(d), (h)—(j), 49 Stat. 1498, 1499; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub. L. 85-791, § 7(b), 72 Stat. 944; June 11, 1960, Pub. L. 86-507, § 1(2), 74 Stat. 200; Feb. 19, 1968, Pub. L. 90-258, § 16, 82 Stat. 30.)

§12a. Registration of commission merchants and brokers; fees; rules and regulations; publication of harmful acts

The Secretary of Agriculture is authorized—

(1) to register futures commission merchants and floor brokers upon application in accordance with rules and regulations and in form and manner to be prescribed by the Secretary of Agriculture; and

(2) to refuse to register any person— • • • •

(7) to disapprove any bylaw, rule, regulation, or resolution made, issued or proposed by a contract market or by the governing board thereof or any committee which relates to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relates to other trading requirements, when he finds that such bylaw, rule, regulation, or resolution violates or will violate any of the provisions of this chapter, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder. (Sept. 21, 1922, ch. 369, § 8a, as added June 15, 1936, ch. 545, § 10, 49 Stat. 1500, and amended Aug. 5, 1955, ch. 574, 69 Stat. 535; Feb. 19, 1968, Pub. L. 90-258, §§ 20-23, 82 Stat. 32, 33.)

§13a. Nonenforcement of rules of government or other violations, cease and desist orders against contract markets; punishment; misdemeanor; separate offenses

If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has vio-

lated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, the commission may, upon notice and hearing and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, and if such contract market, director, officer, agent, or employee thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent, or employee shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500 nor more than $10,000 or imprisoned for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such order continues shall be deemed a separate offense.

(Sept. 21, 1922, ch. 369, § 6b, as added June 15, 1936, ch. 545, § 9, 49 Stat. 1500, and amended Feb. 19, 1968, Pub. L. 90-258, § 18, 82 Stat. 31.)

§13b. **Manipulations or other violations; cease and desist orders against persons other than contract markets; punishment; misdemeanor or felony; separate offenses**

If any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, the Sec-

retary may, upon notice and hearing, and subject to appeal as in other cases provided for in section 9 of this title, make and enter an order directing that such person shall cease and desist therefrom and, if such person thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such person shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500 nor more than $10,000, or imprisoned for not less than six months nor more than one year, or both, except that if such failure or refusal to obey or comply with such order involves any offense within paragraph (a) or (b) of section 13 of this title, such person shall be guilty of a felony and, upon conviction thereof, shall be subject to the penalties of said paragraph (a) or (b): *Provided,* That any such cease and desist order against any respondent in any case of manipulation of, or attempt to manipulate, the price of any commodity shall be issued only in conjunction with an order issued against such respondent under section 9 of this title. Each day during which such failure or refusal to obey or comply with such order continues shall be deemed a separate offense.

(Sept. 21, 1922, ch. 369, § 6(c), as added Feb. 19, 1968, Pub. L. 90-258, § 17, 82 Stat. 31.)

§13c. Responsibility as principal; minor violations

(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if direct-

ly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulations, or orders may be held responsible in administrative proceedings under this chapter for such violation as a principal.

(b) Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action.

(Sept. 21, 1922, ch. 369, § 13, as added Feb. 19, 1968, Pub. L. 90-258, § 26, 82 Stat. 34.)

TITLE 17 C.F.R.

Part 0—Rules of Practice

Subpart A—Rules Applicable to Proceedings Before the Secretary of Agriculture

Rules Applicable to Disciplinary Proceedings

§0.3 Institution of proceedings.

(a) *Application to institute proceeding.* Any interested person having any information of any violation of the act, or of any of the regulations promulgated thereunder, by any person (other than a contract market) may file with the Act Administrator an application requesting the institution of such proceeding as is authorized under the act. Such application shall be in writing, signed by or on behalf of the applicant, and shall include a short and simple statement of the facts constituting the alleged violation and the name and address of the applicant and the name and address of the person against whom the applicant complains.

(b) *Status of applicant.* The person filing an application as described in paragraph (a) of this section shall have no legal status in the proceeding which may be instituted as a result of the application, except where the applicant may be permitted to intervene therein, in the manner provided in this subpart, or may be called as a witness, and the applicant's identity shall not be divulged by any employee of the Department, except with the applicant's prior consent or upon court order.

(c) *Who may institute.* If, after investigation of the matters complained of in the application described in paragraph (a) of this section, or after investigation made on his own motion, the Secretary "has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of the act, or any of the rules and regulations made pursuant to its requirements, or has manipulated or is attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade,"[1] he will institute a proceeding: *Provided*, That in any case, except one of wilfulness or one in which the public health, interest or safety otherwise requires, prior to the institution of a proceeding for the suspension or revocation of a registration or license, facts or conditions which may warrant such action shall be called, in writing, to the attention of the person complained against, and such person shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Proceedings will be instituted only upon complaints issued

[1] Words in quotation marks from sec. 6(b), 42 Stat. 1001, as amended; 7 U.S.C. 15.

by the Secretary and will not be instituted upon pleadings filed by private persons.

§0.8 Intervention.

At any time after the institution of a proceeding, and before it has been submitted to the Secretary for final consideration, the Secretary or the referee may, upon petition in writing and for good cause shown, permit any person to intervene therein. The petition shall state with preciseness and particularity: (a) The petitioner's relationship to the matters involved in the proceeding, (b) the nature of the material he intends to present in evidence, (c) the nature of the argument he intends to make, (d) any other reason that he should be allowed to intervene.

Subpart B—Rules Applicable to Proceedings Before the Commodity Exchange Commission

Rules Applicable to Disciplinary Proceedings

§0.53 Institution of proceedings.

(a) *Application to institute proceedings.* Any interested person having any information of any violation of the act, or of any of the orders or regulations promulgated thereunder, by any board of trade or by any director, officer, agent, or employee thereof may file with the Act Administrator an application requesting the institution of such proceeding as is authorized under the act. Such application shall be in writing, signed by or on behalf of the applicant, and shall include a short and simple statement of the facts constituting the alleged violation and the name and address of the applicant and the name and address of the person against whom the applicant complains.

(b) *Status of applicant.* The person filing an application as described in paragraph (a) of this section shall have no legal status in the proceeding which may be instituted as a result of the application, except where the applicant may be permitted to intervene therein, in the manner provided in this subpart, or may be called as a witness, and the applicant's identity shall not be divulged by any employee of the Department, except with the applicant's prior consent or upon court order.

(c) *Who may institute.* If, after investigation of the matters complained of in the application described in paragraph (a) of this section, or after investigation made on its own motion, the Commission has reason to believe that any board of trade or any director, officer, agent, or employee thereof has violated or is violating any of the provisions of the act, or of any of the regulations promulgated thereunder, the Commission will institute an appropriate proceeding: *Provided,* That in any case, except one of willfullness or one in which the public health, interest or safety otherwise requires, prior to the institution of a proceeding for the suspension or revocation of any designation of a contract market, facts or conditions which may warrant such action shall be called to the attention of the market in writing and such market shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Proceedings will be instituted only upon complaints issued by the Commission and will not be instituted upon pleadings filed by private persons.

§0.58 Intervention.

At any time after the institution of a proceeding, and before it has been submitted to the Commission for final

consideration, the Commission or the referee may, upon petition in writing and for good cause shown, permit any person to intervene therein. The petition shall state with preciseness and particularity: (a) The petitioner's relationship to the matters involved in the proceeding, (b) the nature of the material he intends to present in evidence, (c) the nature of the argument he intends to make, (d) any other reason that he should be allowed to intervene.

Part 1—General Regulations Under the Commodity Exchange Act

Registration of Futures Commission Merchants and Floor Brokers

§1.7 Registration required of futures commission merchants.

No person shall engage as futures commission merchant in the solicitation or acceptance of orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market, unless the Secretary of Agriculture has registered such person as futures commission merchant under the Commodity Exchange Act and such registration has not expired and is not under suspension or revocation.

[36 F.R. 22810, Dec. 1, 1971]

§1.8 Registration required of floor brokers.

No person shall act as floor broker in executing any orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market unless such person shall have been register-

ed as floor broker under the Commodity Exchange Act by the Secretary of Agriculture and such registration shall not have expired, been suspended, or been revoked.

[33 F.R. 14454, Sept. 26, 1968]

Miscellaneous

§1.41 Contract market rules, regulations; filing of copies.

Each contract market shall promptly furnish to the Commodity Exchange Authority copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof, or by any committee or clearing organization thereof, and of all changes and proposed changes therein, and shall notify the Commodity Exchange Authority promptly of all changes in its membership. Three copies of all such material shall be furnished to the Act Administrator, Commodity Exchange Authority, U.S. Department of Agriculture, Washington, D.C. 20250, and one copy shall be furnished to the director of the regional office of the Commodity Exchange Authority having local jurisdiction with respect to such contract market.

(Sec. 8a, as amended by secs. 20-23, 82 Stat. 32, 33; 7 U.S.C. 12a, 1964 ed., Supp. IV 1969) [35 F.R. 11018, July 9, 1970]

SHERMAN ACT, §1, 15 U.S.C. §1

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * *